BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

[For index, table of cases, reference to opinions below, jurisdictional statement, statement of the case raised by the present Petition and Assignments of Error, we refer to the Petition.]

ARGUMENT.

The Argument is presented under two Points as follows:

POINT I.

THE PROPER INTERPRETATION OF THE PHRASE "CONTROLLING INFLUENCE" IN THE ACT IS A QUESTION OF SUBSTANCE RELATING TO THE CONSTRUCTION OF A STATUTE OF THE UNITED STATES WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

POINT II.

THE COMMISSION'S ULTIMATE INFERENTIAL FINDING OF "PAST RELATIONSHIPS BETWEEN APPLICANT [AMERICAN GAS] AND BOND AND SHARE WHICH CLEARLY 'HAVE RESULTED IN A PERSONNEL AND TRADITION' WHICH MAKE APPLICANT RESPONSIVE TO BOND AND SHARE'S DESIRES" IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. THE EVIDENCE AS A WHOLE ESTABLISHES THE CONTRARY. THE COMMISSION'S INFERENCE IS DIRECTLY NEGATIVED BY PRESENT FACTS ESTABLISHED BY COMPETENT, ADEQUATE, DIRECT AND UNCONTRADICTED EVIDENCE. THE COMMISSION'S ORDER DENYING THE APPLICATION OF AMERICAN GAS FOR AN ORDER DECLARING IT NOT TO BE A SUBSIDIARY OF BOND AND SHARE IS ARBITRARY AND UNLAWFUL.

POINT I.

The Proper Interpretation of the Phrase "Controlling Influence" in the Act is a Question of Substance Relating to the Construction of a Statute of the United States Which Has Not Been But Should be Settled by This Court.

The question is one of substance and general importance because one interpretation as contrasted with another may determine, one way or the other, matters of major importance.

For example, in *Pacific Gas and Electric Company* v. *Securities and Exchange Commission*, 127 Fed. (2d) 378 (1942), now on rehearing in the United States Circuit Court of Appeals for the Ninth Circuit, this question of statutory interpretation will determine whether that intrastate operating utility is or is not within the ambit of the Act.

In the present case the matter which hangs on this question of interpretation is different but is equally material and of vital importance to American Gas.

American Gas is itself a registered holding company under the Act and, as such, it and its subsidiaries are fully subject to the provisions of the Act and to the jurisdiction of the Commission affecting such holding companies and their subsidiaries. It has no desire to be otherwise, and the present case involves no question as to this regulatable and regulated status of Petitioner and its own system. Petitioner has sought and still seeks recognition and declaration that it is not a subsidiary of Bond and Share so that the provisions of the Act and the Commission's orders to effectuate them shall, as to Petitioner, be addressed to it and its system directly and separately and not as a part of the larger and more complicated system of Bond and Share.

The declaration, to which Petitioner believes it is

entitled, that it is not, within the meaning of the Act, a subsidiary of Bond and Share, is of vital importance to Petitioner and its system in connection particularly with the application of the integration provisions of Section 11 of the Act. Under Section 11, each registered Holding Company must confine its operations to a single integrated public utility system* which is defined in Section 2(a)(29)(A) as units of generating plants, transmission lines and distributing facilities which "are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation." Petitioner believes that its own present system conforms to this requirement, constituting one principal interconnected system extending generally from Roanoke, Virginia, to South Bend, Indiana, and two additional systems, one in Northeastern Pennsylvania and the other in Southern New Jersey. It has filed its Plan (Tr. Doc. No. 136) to this effect under Section 11(e) of the Act and the Commission has held extended hearings on that Plan, but that proceeding has not as yet been concluded and, of course, no finding or order has been made therein by the Commission.

Petitioner looks forward without alarm to the ultimate result of the application of the integration provisions of

* Section 11 also provides that the Commission shall permit a registered holding company to continue to control one or more additional integrated public utility systems if the Commission finds that each of such additional systems cannot be operated indepenently without the loss of substantial economies, that all of such additional systems are located in one state or in adjoining states and that the continued combination of such systems under the control of the holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation or the effectiveness of regulation.

the Act if applied directly and singly to its own system. But it looks forward with dismay to what may happen if its integration problem becomes but a part of the vastly more difficult and more confused problem of the integration of Bond and Share.

The complicated system of Bond and Share is described in footnote 5 to the Commission's findings as follows (R. 19):

> "Bond and Share also owns 20.7%, 42.4%, 46.6%, and 47%, respectively, of the outstanding voting securities of American Power and Light Company, American and Foreign Power Company, Inc., National Power and Light Company, and Electric Power and Light Corporation, all of them registered holding companies. By reason of such holdings, all of these companies are subsidiaries of Bond and Share under clause (*A*) of Section 2 (*a*) (8) and none of them has filed an application under the last paragraph of Section 2 (*a*) (8). These companies are sometimes referred to herein as acknowledged subsidaries of Bond and Share and as American Power, American and Foreign Power, National Power, and Electric Power, respectively. Utility companies in the Bond and Share system operate in 27 states and 13 foreign countries."

If American Gas *is* a subsidiary of Bond and Share, its fate merges with the fate of this complicated system and it is placed at the mercy of some final solution of Bond and Share integration which (whatever other aspects it may have) *must* leave Bond and Share with but one principal integrated system.

The Commission has recognized the vital importance of Petitioner's status as being, or not being, a subsidiary of Bond and Share by pointing out in footnote 64 to its findings that:

> "* * * the status of applicant [Petitioner] may be of vital importance to the determination which the Commission may make in the Section 11 proceeding presently pending against Bond and Share." (R. 59.)

This importance extends not only to "the determination which the Commission may make" but equally to the fate which Petitioner may suffer.

How *real* a question there is as to the correct construction of the phrase "controlling influence" as used in the Act may be seen by brief reference to some of the different views concerning it.

In the Act as originally introduced (H. R. 5423 and S. 1275, 79th Congress, 1st Session), the corresponding provision used the phrase "material influence." Later when Senate Bill 2796 was substituted for the original draft, this phrase was changed to "controlling influence." This would seem to furnish an accurate index of a precise legislative intent. Having pondered whether a *material* influence should be deemed sufficient to create a parent-subsidiary relationship, Congress decided it should not. To have that result Congress stipulated that an influence must be "controlling."

And the matter was so explained on the floor of the Senate by the manager of the bill.

> "Even if they hold 40% of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company." (79 Cong. Rec. 8397.)

> "Unless I control that company I am not a holding company under the terms of this bill. The mere ownership of the 10 per cent of the stock does not of itself make him a holding company, because unless he actually controls the company he is not a holding company." (79 Cong. Rec. 8439.)

Legislative history, always a good guide to statutory construction, is here a guide of exceptional clarity. The end test of parent-subsidiary status was made "control." In clause (i) of Section 2(a)(8) the phrase "controlled, directly or indirectly by * * *" means control by ownership or representation: the classic forms of control such as majority stock ownership (as was substantially true in the Public Service Corporation of New Jersey Case*) or designation of the majority or all of the Board of Directors (as was true in the Detroit Edison Case†).

The substitute bill in which "material influence" had been changed to "controlling influence" was reported by the Senate Committee on May 7, 1935, with its Report No. 651 (S. 2796). The following paragraph appears on page 5 of that Report:

> "The term 'holding company' (together with its converse, 'subsidiary company') has been completely rewritten in the interests of clarity and definiteness so that persons may be more fairly apprised of their status under title I. In that part of the definition of holding company which is self-operative (*i. e.*, without determination in each case by the Commission) the original test was merely 'control' of operating companies. The committee has adopted the definite standard of 10 percent voting control—with provision whereby a company which does not actually control operating companies, even though it owns 10 percent or more of the voting control, can apply to the Commission for determination that it is not a holding company, and, pending the Commission's action on the application, be relieved of the provisions of the title. Corresponding changes have

* Public Service Company of New Jersey *v.* Securities and Exchange Commission, 129 Fed. (2d) 899.

† Detroit Edison Co. *v.* Securities and Exchange Commission, 119 Fed. (2d) 730.

been made in the definition of subsidiary company. The flexible part of each definition has been retained, *i. e.*, a person is a holding company *if the Commission finds that he exercises a 'controlling influence' over the management or policies of a utility company.* S. 1725 had used the phrase 'material influence.' The provision that a person is not affected by this part of the definition until after the Commission's hearing and determination has been retained; and a similar provision has been added for the benefit of subsidiary companies under that portion of the converse definition." (Emphasis supplied.)

The following paragraphs appear on page 23 of the same report:

"'Holding company' (7) is defined in two parts: (A) In terms of ownership, directly or indirectly, of 10 percent of the voting control of a utility (gas or electric) company; and (B) in terms of '*exercising a controlling influence*' over the management or policies of a utility company. Under the flexible definition in (B), no company is to be deemed a holding company or have any duty as such until the Commission so finds after notice and opportunity for hearing. The flexibility here provided is necessary in order that title I can meet the *varied* and subtle *forms* which corporate interrelationships have in the past and will in the future take. A company which is automatically a holding company under (A) by reason of stock ownership can nevertheless file an application for determination that it is not a holding company *in terms of controlling a public-utility company.* Pending the Commission's action on such an application, the provisions of the title are suspended as to the applicant. (Emphasis supplied.)

"'Subsidiary company' (8) is also defined, conversely from 'holding company', in terms of stock

> ownership and subjection to a controlling influence; the same administrative machinery for Commission determination and exemption is provided."

These two paragraphs also appear in identical form at page 9 of House Report No. 1318 of June 24, 1935.

"Controlling influence" means "control by influence" and covers, as contrasted with "controlled by," a different mechanism to the same end result, *i. e.*, "control." It was with different "forms" that Congress was concerned, not with different end results. The relationship in some form had (1) to exist and (2) either be "controlling" or produce the result "control" which are one and the same thing.

But the Court of Appeals has now construed "controlling influence" to cover an influence not presently in action and one which, if aroused to action, is impotent to control.

In so doing, that Court has adopted the construction of "controlling influence" announced by the Circuit Court of Appeals, Sixth Circuit, in the Detroit Edison Case (*supra*), which was in turn followed by the Circuit Court of Appeals for the Third Circuit in the Public Service Company of New Jersey Case (*supra*). We are aware that petitions for certiorari were denied in both of those cases. We do not, however, construe such denials as the adoption by this Court of such construction of "controlling influence." In each of those cases, the holding company in question actually had control. In the Detroit Edison Case, it appeared (119 Fed. (2d) at p. 735):

> "The personal stockholdings of petitioner's directors and of its officers are negligible. None of petitioner's stockholders, other than North American, ever appear to have designated any of petitioner's

> officers or directors and none of petitioner's officers or directors appear to have had any relationships to any substantial stockholder of petitioner except North American."*

and

> "For many years petitioner has designated representatives to the Station Advisory Committee, an organization consisting of a group of engineers meeting to exchange ideas on operating methods, costs of properties and technical developments. All other companies participating in the activities of the committee are statutory subsidiaries of North American."†

If I am the only stockholder represented on the Board of Directors of a company and designate all of its directors and officers, I am, so long as that set of facts exists, in control of that company; particularly if, in addition,

* No such situation exists in the present case. Only two of Petitioner's board of fifteen and one of its Executive Committee of five have any connection with Bond and Share or with any company in the Bond and Share system. It does not appear that Bond and Share ever "designated" any of Petitioner's directors. Many members of the board, including some who are Petitioner's officers and some who are not, own or represent large independent stockholdings (R. 536, 27, 30, 37, 38). In each of the years 1938, 1939 and 1940 a vacancy occurred on Petitioner's board and these vacancies were filled as follows: In 1938 by the election of G. A. Elliott, a large holder of Petitioner's stock having no connection with Bond and Share and suggested by Petitioner's President, Mr. Tidd (R. 314); in 1939 by the election of R. E. Breed 3d, representing large family holdings of Petitioner's stock (R. 314) and having no connection with Bond and Share; in 1940 by the election of G. M. Moffett, an experienced executive as President of Corn Products Refining Company having no connection with Bond and Share and suggested by Harrison Williams (R. 314), an independent director with no connection with Bond and Share.

† Petitioner in the present case has always had its own technical, managerial and supervisory staff and has never received any service or advice from Bond and Share's similar staff which renders such services to Bond and Share's acknowledged subsidiaries. In financial matters only has Bond and Share, in the years when it acted as Petitioner's fiscal agent, ever supervised any activities of American Gas and this ceased in 1928-1931 (R. 538).

its officers regularly confer on operating and technical matters with the officers of my other companies. The decision in the Detroit Edison Case would have been the same if the Court of Appeals had construed "controlling influence" to mean "control by influence."

In the Public Service Company of New Jersey Case (*supra*), it appeared that United Corporation and its subsidiary, United Gas Improvement Company, owned together 42.3% of the voting stock of Public Service and from 1929 to 1940 cast a majority of the total votes cast at each annual meeting of Public Service stockholders. This, in the business world, would be considered effective control. This case might have been decided under the control clause (viz., clause (i) of Section 2(a)(8)) but was probably more appropriately decided under clause (iii) inasmuch as the effective control by stock ownership was split between two affiliated companies. And the decision would have been the same if the Court of Appeals had construed "controlling influence" to mean "control by influence."*

Four months before the Court of Appeals for the Third Circuit, in deciding the Public Service Case, followed the construction of "controlling influence" previously announced by the Court of Appeals for the Sixth Circuit in the Detroit Edison Case, the Court of Appeals for the Ninth Circuit, in deciding the Pacific Gas and Electric Case, announced a wholly new construction of the "controlling influence" clause by which not three (viz., (i), (ii) and (iii)) negative tests must be met, but four, the fourth being independent of the three enumerated in the section and being erected from the qualifying phrase:

* No such situation exists in the present case. Bond and Share holds but 17.51% of Petitioner's outstanding voting securities and for many years has voted only about 25% of the total shares represented and voting at meetings of Petitioner's stockholders (R. 46).

> "so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties and liabilities imposed in this title upon subsidiary companies of holding companies."

In a dissenting opinion, Circuit Judge Garrecht stated his view on this question of construction as follows (127 Fed. (2d) at p. 392):

> "It seems to me that the opinion of the Court has added to the Act by judicial construction conditions not imposed by Congress and by which the Commission has been relieved of the obligation which requires that the findings be sustained by substantial evidence."

The present status of this important question of statutory construction is this:

1. We have the interpretation announced in the Detroit Edison and Public Service cases, but not, it is submitted, necessary to their decision.

2. We have the totally different interpretation announced by the majority opinion in the Pacific Gas and Electric Case, now upon rehearing before the Court that announced it.

3. We have the interpretation indicated by the ordinary meaning of the word "controlling" and by the legislative history and congressional debates, and propounded by Circuit Judge Garrecht in his dissenting opinion in the Pacific Gas and Electric Case.

4. In the present case we have the Detroit Edison interpretation adopted by the majority, with Associate Justice Stephens in a dissenting opinion notable for completeness, precision and clarity announcing as his own interpretation one closely similar to that of Circuit Judge Garrecht.

It is apparent that neither the Court of Appeals for the Ninth Circuit nor Circuit Judge Garrecht nor Associate Justice Stephens consider that this Court settled that question of statutory interpretation when it denied the petition for certiorari in the Detroit Edison Case.

It is respectfully submitted that the question is of such substance and such general importance that it should be settled by this Court.

And this case is an appropriate one for such settlement of that question because, regardless of the disposition of the question under the "substantial evidence" rule (Point II of this Argument), the action of the Court of Appeals and of the Commission cannot be upheld unless "controlling influence" is interpreted to mean something that is not controlling.

POINT II.

The Commission's Ultimate Inferential Finding of "Past Relationships Between Applicant [American Gas] and Bond and Share Which Clearly 'Have Resulted in a Personnel and Tradition' Which Make Applicant Responsive to Bond and Share's Desires" Is Not Supported By Substantial Evidence. The Evidence As a Whole Establishes the Contrary. The Commission's Inference Is Directly Negatived By Present Facts Established by Competent, Adequate, Direct and Uncontradicted Evidence. The Commission's Order Denying the Application of American Gas for an Order Declaring It Not to Be a Subsidiary of Bond and Share Is Arbitrary and Unlawful.

In presenting this point, we are well aware that the recent decisions of this Court have set very narrow limits

to the scope of judicial review of the findings of fact made by an administrative commission functioning under a statute which provides that such findings "if supported by substantial evidence, shall be conclusive."

It is for the Commission to find the basic facts, and as to its factual findings of this character, no question is here raised.

It is for the Commission, in the first instance, to indulge inferences from basic facts but those inferences must arise from a consideration of the entire record and must bear a logical and coherent relationship to the basic facts from which they are inferred. If a reasonable man, upon the whole record, could not reach the ultimate inferential finding which the Commission has made, then that finding is not supported by substantial evidence and the Commission's action bottomed thereon is arbitrary and capricious and should be reversed.

It was our contention in the Court of Appeals, and will be our contention in this Court, should the writ be granted, that this is such a case.

Specifically, we contend:

1. That the Commission's ultimate inferential finding of " 'a personnel and tradition' [in American Gas] which make applicant [American Gas] responsive to Bond and Share's desires" was bottomed not on the entire record but on a part only, viz., on "past relationships" concededly no longer existing.

2. That those partial basic facts, in the language employed by the dissenting Associate Justice, "support no reasonable inference of presently effective domination by

Bond and Share of American Gas management or policies and that they reasonably support a contrary inference." And that other basic facts enumerated by the dissenting Associate Justice (R. 544, 545), "while consistent with all of the other facts in the case, are * * * wholly inconsistent with the conclusion which the Commission has drawn, *i. e.*, that American Gas is 'responsive to Bond and Share's desires'."

3. That, even if the Commission's inferential finding did bear a rational and coherent relation to the partial facts on which the Commission sought to bottom it, it must fall before direct contemporaneous proof which shows that the fact inferred does not exist.

We accept the dissenting Opinion of Associate Justice Stephens as adequately presenting, for the purposes of this brief, our contention that the Commission's ultimate finding of fact is not supported by substantial evidence and that the Commission's action based thereon is arbitrary and capricious and should be reversed.

One feature of this case does, however, warrant special mention because no such feature was present in the Detroit Edison Case or the Public Service Case or the Pacific Gas and Electric Case or, so far as we have been able to find, in any other case which has arisen under Section 2(a)(8) of the Act:

In those cases the Commission necessarily had to rely on inferences because there was no proof of a current attempt by the specified holding company to exercise its influence to control its alleged subsidiary in a matter of management or policy.

In this case such an event occurred, and its occurrence and its outcome are proved by direct, competent and un-

contradicted testimony. All of this is succinctly set forth in footnote 16 to Associate Justice Stephens' dissenting Opinion (R. 539) to which we respectfully refer. The question of the best policy to pursue in meeting Section 11 of the Act was and still is a question of policy of the first magnitude for any holding company. In the Fall of 1938 when some step was ripe to be taken in this matter, the officers of American Gas thought the best policy for it was to file for its own system a formal Plan of Integration under Section 11(e). The officers of Bond and Share disagreed with this judgment and did their best to induce the officers of American Gas to adopt a different policy. Their efforts failed to control, or even to affect at all, the policy determined on by the officers of American Gas. The original policy of American Gas was pursued, unaltered, although this, because of the conflict of interest involved, necessitated the employment by American Gas of independent counsel. This was done, American Gas filed its own formal Plan, which has been the subject of hearings by the Commission and is still there pending.

It is not here important which view on this vital question of policy was the wisest. It is clear that both groups of officers were sincere as to the wisdom of their own respective and divergent views. And being so convinced on this matter of vital policy, Bond and Share exerted the full weight of its influence to control the policy of American Gas, and failed. That influence, when thus currently put to the test, was found impotent to control.

In the face of such direct contemporaneous proof, an inference from "past relationships" of "'a personnel and tradition' which make applicant responsive to Bond and Share's desires" cannot stand.

In *Pennsylvania Railroad Company* v. *Chamberlain,* 288 U. S. 333 (1933), this Court said at pages 340-341:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. * * * A rebuttable inference of fact, as said by the court in the Wabash Railroad case [141 Fed. 932, 935 (C. C. A. 8th, 1905)], 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the court in George *v.* Missouri Pac. R. Co. * * * [213 Mo. App. 668, 674, 251 S. W. 729, 732 (1923)], 'It is well settled that where plaintiff's case is based upon an inference or inferences, * * * the case must fail upon proof of undisputed facts inconsistent with such inferences.' * * *"

The foregoing quotation is also quoted in footnote 3 to the dissenting Opinion (R. 532, 533), to the whole of which footnote we most respectfully refer as presenting the legal principles which we believe are involved in the application of the "substantial evidence" rule. When these principles are applied to the entire record in the present case, it will appear that the Commission's ultimate finding of fact is not supported by substantial evidence and that its action based thereon is arbitrary and capricious.

CONCLUSION.

Petitioner submits that either Point I or Point II summarized above furnishes an adequate reason why this Court should review the action of the Court below and, to this end, grant our Petition for a Writ of Certiorari.

Respectfully submitted,

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APRIL 28, 1943.